JCT LIMITED v. MUNIANDY NADASAN & ORS AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ ABDUL RAHIM JCA
DAVID WONG DAK WAH JCA
ABANG ISKANDAR JCA
[CIVIL APPEALS NO: W-02(NCC)(W)-1228-07-2014 &
W-02(NCC)(W)-1229-07-2014]
30 DECEMBER 2015

COMPANY LAW: *Fraudulent trading – Elements of offence – Whether business conducted in manner so as to defraud creditors – Whether element of dishonesty proven – Whether creditors deceived and deprived of funds meant to service their loans – Companies Act 1965, s. 304*

CIVIL PROCEDURE: *Pleadings – Findings on matters not pleaded – Failure to plead undue preference under s. 293 of Companies Act 1965 read together with s. 53 of Bankruptcy Act 1967 – Reliance on omnibus prayer that 'undue influence' could fall into paragraphs in pleadings – Whether omnibus prayer is pleading clause – Whether failure to specifically plead undue preference detrimental – Whether orders of trial judge sustainable*

EVIDENCE: *Standard of proof – Fraudulent trading – Trial judge adopted criminal standard of proof in cases of fraudulent trading under s. 304 of Companies Act 1965 – Whether ought to be on standard of balance of probabilities – Whether caused injustice – Whether trial judge erred*

There were two appeals herein, namely Civil Appeal No. W-02(NCC)(W)-1228-17-2014 ('Appeal No 1228') and Civil Appeal No. W-02(NCC)(W)-1229-17-2014 ('Appeal No 1229'). The respondents in both appeals were the employees of CNLT (Far East) Berhad ('CNLT'), the ninth defendant in the High Court, which carried out the business of manufacturing and sale of yarn. CNLT was wound up on 16 January 2009. The first to sixth defendants were all the directors of CNLT. The seventh defendant was the Human Resources Manager of CNLT. The eighth defendant, JCT Limited ('JCT'), an Indian incorporated company and a substantial shareholder in CNLT, was the appellant in the Appeal No 1228. The first defendant, one Dato' Prem Krishna Sahgal ('Sahgal'), the executive managing director of CNLT and the controlling mind of CNLT, was the appellant in the Appeal No 1229. The claim of the respondents was for arrears of salary and workers' compensation in the sum of RM2,910,201.78 based on the tort of conspiracy to injure. The respondents' cause of action was that CNLT provided the solvency declaration to the Kuala Lumpur Stock Exchange ('BURSA') showing that they were solvent when in fact they were not, hence, misleading the respondents, who were then the creditors, BURSA as well as the general public. It was also alleged that Sahgal and the rest of the defendants, despite

having the knowledge that CNLT was insolvent and a non-going concern, continued to mislead the employees, creditors, investors and general public that CNLT was a going concern so as to enable it to continue to trade and be given credit facilities, by unsuspecting creditors and suppliers. From March 2008 till 16 January 2009, no payment was made to the respondents. However, on 30 April 2008 and 10 May 2008 a memoranda was issued to the respondents placing them on full pay and assuring them that their contracts of employment would continue in force. According to the respondents, the memoranda amounted to a deception as Sahgal and the rest of the defendants knew fully-well that there would be no payment coming. Premised on those particulars, the respondents filed the suit seeking a declaration that the business of CNLT had been carried out with intent to defraud the creditors of CNLT and the declaration that the defendants were liable for all the debts or liabilities of CNLT. The trial judge in sustaining the respondents' claims ordered, *inter alia*, that (i) the respondents were entitled to a declaration that the business of CNLT was carried on by Sahgal with intent to defraud the creditors of CNLT, including the respondents, pursuant to s. 304 of the Companies Act 1965 ('CA'); (ii) a declaration that Sahgal was personally liable to the employees of CNLT and to pay the outstanding debt due and owing to the respondents in the sum of RM2,910,201.78; (iii) all payments channelled to JCT which amounted to fraudulent preference were declared void; (iv) an inquiry/assessment carried out by the liquidator for an account of monies siphoned or channelled to JCT by Sahgal; and (v) repayment by JCT of those monies wrongfully channelled to or dissipated by Sahgal to JCT be made to the liquidators for distribution amongst the body of unsecured creditors in accordance with the law. The issues for determination in Appeal No 1228 were: (i) whether the respondents had specifically pleaded undue preference under s. 293 of the CA read together with s. 53 of the Bankruptcy Act 1967 ('BA'); and (ii) whether the trial judge was correct to make a finding of undue preference payment under s. 293 of the CA together with s. 53 of the BA. The issues raised in Appeal No 1229 were: (i) the trial judge had erred in law in adopting a sliding scale as to the criminal standard of proof in cases of fraudulent trading under s. 304 of the CA; (ii) the facts of the case did not support a claim under s. 304 of the CA; and (iii) alternatively, Sahgal was not responsible for the incurrence of the said debt.

Appeal No 1228

Held (allowing appeal with costs; setting aside orders of the High Court in part)
Per David Wong Dak Wah JCA:

(1) When evidence was led on the matter of undue preference, there was neither objection nor rebuttal to the evidence proffered by the respondents. Hence, it did not help the respondents as the trial judge could not grant orders which the respondents did not ask for in their

prayers. The appellant had no duty to rebut evidence when they were of no relevance to the premised cause of action, in this case, intent to defraud creditors of CNLT. (para 32)

(2) The paragraphs in the re-amended statement of claim referred to by the respondents were insufficient to constitute a pleading for undue preference. The respondents, in their submissions, relied on the omnibus prayer that 'undue influence' could fall into the paragraphs. However, the omnibus prayer was not a pleading clause. Facts which would show that there was undue preference ought to have been specifically pleaded. In the circumstances, the part of the orders of the trial judge could not stand as she had deviated from the litigants' dispute as per the pleadings. Therefore, the trial judge had erred in not appreciating the nature of the provisions in s. 293 of the CA and s. 53 of the BA. (para 33)

Appeal No 1229

Per Abang Iskandar JCA (dismissing appeal):

(1) The respondents were required to lead evidence on standard of proof that is higher than the one on the balance of probabilities and one that is nearer to the burden of proving the case beyond reasonable doubt. Section 304(1) of the CA provides for a civil claim against an errant director on the ground of fraudulent trading. Subsection (5) to s. 304 gives the regulator the necessary power to prosecute such a person so described thereunder and such person, if found guilty by the court, could be staring at the penal sanctions. Hence, while sub-s. (1) to s. 304 of the CA provides a platform for a civil claim to be pursued, sub-s. (5), on the other hand, empowers the regulator to criminalise such impugned conduct on the part of any such person. They provide for a different kind of possible action against such a person. Therefore there was no merit in the contention that s. 304 of the CA is criminal in nature. (paras 61, 63, 65 & 67)

(2) There was no merit in the legal point pertaining to the proper attendant standard of proof to be discharged by the respondent as raised by Sahgal. If ever, the trial judge was in error with regard to the standard of proof at play, she had in fact erred in favour of Sahgal, when she had subjected the plaintiffs' evidence against a higher standard, when in law, the lower standard, namely on the balance of probabilities, ought to have sufficed. As such, no injustice had been occasioned to Sahgal in the circumstances and there was therefore no appealable error warranting appellate intervention. (para 72)

(3) Section 304(1) of the CA requires proof that the errant person must be shown to be responsible to doing business of the company in such a manner so as to defraud the creditors of the company. Merely doing

business with knowledge that the company will not be able to pay later is not *per se* sufficient to trigger the subsection. There must be proven as well the element of dishonesty on the part of the alleged perpetrator when such business was conducted. The evidence in this case had shown clearly many circumstances on the part of Sahgal where such element of dishonesty on his part can be readily attributed to him. (paras 80 & 82)

(4) The actions of CNLT, through Sahgal, who was then the managing director, had been designed to defraud the creditors. He was dishonest in his dealings, the results of which had been that the creditors were defrauded. He dealt in transactions that had dubious objectives which not only had adverse ramifications on CNLT itself, but they also had the effect of defrauding the creditors by holding out that CNLT was a going concern, so that the creditors would continue to do business with CNLT, when in fact, the latter was insolvent. Further, the payments made to JCT were business transactions that were carried out by Sahgal to defraud the creditors, as they were clearly deprived of repayments of their loans to CNLT. As such, the trial judge was justified in making the consequential order against JCT to repay the monies, so dubiously paid to it, back to the provisional liquidators of CNLT. (para 86)

(5) There were overwhelming evidence to show that CNLT, through Sahgal, had carried on business with the intention to defraud the creditors, including the plaintiffs. Objectively, the effect of Sahgal's action would be to deceive creditors in the sense that they would not foreclose on the loans given to CNLT. The fraudulent siphoning of monies to JCT would also deprive creditors of ready funds that could be used to service their loans. In the context of the evidence adduced, Sahgal was properly the person envisaged under s. 304(1) of the CA against whom the declarations had been correctly made. In that regard, the alternative submission by Sahgal that he was not liable under s. 304(1) of the CA must also fail. In the circumstances, the trial judge was correct in declaring that the business of CNLT was carried on by Sahgal with intent to defraud the creditors pursuant to s. 304 of the CA. (paras 110 & 112)

Bahasa Malaysia *Headnotes*

Timbul dua rayuan dalam kes ini iaitu Rayuan Sivil No. W-02(NCC)(W)-1228-17-2014 ('Rayuan No 1228') dan Rayuan Sivil No. W-02(NCC)(W)-1229-17-2014 ('Rayuan No 1229'). Responden-responden dalam kedua-dua rayuan adalah pekerja-pekerja CNLT (Far East) Berhad ('CNLT'), defendan kesembilan di Mahkamah Tinggi, yang menjalankan perniagaan pembuatan dan penjualan benang. CNLT digulung pada 16 Januari 2009. Defendan pertama hingga keenam adalah pengarah-pengarah CNLT. Defendan ketujuh merupakan Pengurus Sumber Manusia CNLT. Defendan kelapan, JCT Limited ('JCT'), sebuah syarikat yang diperbadan di India dan pemegang saham utama dalam CNLT adalah perayu dalam Rayuan No 1228. Defendan

pertama, Dato' Prem Krishna Sahgal ('Sahgal'), pengarah urusan eksekutif CNLT dan bertindak sebagai kuasa yang mengawal CNLT adalah perayu dalam Rayuan No 1229. Tuntutan responden-responden adalah untuk tunggakan gaji dan pampasan pekerja berjumlah RM2,910,201.78 berdasarkan tort konspirasi yang menyebabkan kerugian. Kausa tindakan responden-responden adalah bahawa CNLT menyediakan deklarasi kemampuan membayar hutang kepada Bursa Saham Kuala Lumpur ('BURSA'), menunjukkan bahawa mereka mampu membayar hutang sedangkan sebenarnya tidak, oleh itu, mengelirukan responden-responden, yang ketika itu pemiutang, BURSA serta orang awam. Juga didakwa bahawa Sahgal dan defendan-defendan selebihnya, walaupun tahu CNLT muflis dan mengalami kerugian, terus mengelirukan kakitangan, pemiutang, pelabur dan orang awam bahawa CNLT adalah satu perniagaan yang menguntungkan untuk membolehkannya terus berniaga dan diberi kemudahan kredit oleh pemiutang dan pembekal yang tidak mencurigainya. Dari Mac 2008 hingga 16 Januari 2009, tiada bayaran dibuat kepada responden-responden. Walau bagaimanapun, pada 30 April 2008 dan 10 Mei 2008, satu memorandum dikeluarkan kepada responden-responden untuk menyediakan mereka gaji penuh dan meyakinkan mereka bahawa kontrak pekerjaan mereka akan terus berkuat kuasa. Menurut responden-responden, memorandum tersebut adalah satu penipuan kerana Sahgal dan defendan-defendan selebihnya mengetahui tiada bayaran yang akan dibuat. Berdasarkan butir-butir itu, responden-responden memfailkan saman memohon deklarasi agar perniagaan CNLT dijalankan dengan tujuan menipu pemiutang-pemiutang CNLT dan perisytiharan agar defendan-defendan bertanggungjawab ke atas semua hutang dan liabiliti CNLT. Hakim bicara dalam mengekalkan tuntutan responden-responden memerintahkan, antara lain, bahawa (i) responden-responden berhak kepada deklarasi perniagaan CNLT dijalankan oleh Sahgal dengan niat menipu pemiutang-pemiutang CNLT termasuk responden-responden menurut s. 304 Akta Syarikat 1965 ('AS'); (ii) deklarasi bahawa Sahgal bertanggungan secara peribadi kepada pekerja-pekerja CNLT dan untuk membayar hutang tertunggak yang perlu dibayar dan terhutang kepada responden-responden berjumlah RM2,910,201.78; (iii) semua bayaran yang disalurkan kepada JCT yang membentuk keutamaan secara penipuan diisytiharkan tidak sah; (iv) pertanyaan/penilaian dijalankan oleh pelikuidasi-pelikuidasi untuk akaun wang yang disalurkan kepada JCT oleh Sahgal; dan (v) bayaran balik oleh JCT, wang yang disalurkan secara salah kepada atau dilesapkan oleh Sahgal kepada JCT, kepada pelikuidasi-pelikuidasi untuk agihan antara badan pemiutang bercagar mengikut undang-undang. Isu-isu untuk penentuan dalam Rayuan No 1228 adalah: (i) sama ada responden-responden secara khusus memplid keutamaan tidak wajar di bawah s. 293 AS dibaca bersama-sama dengan s. 53 Akta Kebankrapan 1967 ('AK'); dan (ii) sama ada hakim bicara betul dalam membuat dapatan bayaran keutamaan tidak wajar di bawah s. 293 AS bersama-sama dengan s. 53 AK. Isu-isu yang dibangkitkan dalam Rayuan No 1229 adalah: (i) hakim bicara khilaf dari segi undang-undang dalam mengguna pakai skala

A gelongsor dengan standard pembuktian jenayah dalam kes-kes perdagangan penipuan di bawah s. 304 AS; (ii) fakta kes tidak menyokong tuntutan di bawah s. 304 AS; dan (iii) secara alternatif, Sahgal tidak bertanggungan terhadap penglibatan hutang tersebut.

Rayuan No 1228

B

Diputuskan (membenarkan rayuan dengan kos; menolak sebahagian perintah Mahkamah Tinggi)
Oleh David Wong Dak Wah HMR:

(1) Apabila keterangan dikemukakan berkaitan perkara keutamaan tidak
C wajar, tiada bantahan mahupun sangkalan terhadap keterangan tersebut ditawarkan oleh responden-responden. Ini tidak membantu responden-responden kerana hakim bicara tidak dapat memberikan arahan yang tidak dipohon responden-responden dalam tuntutan mereka. Perayu tidak mempunyai kewajipan menyangkal keterangan apabila tidak
D relevan dengan kausa tindakan, dalam kes ini, niat menipu pemiutang-pemiutang CNLT.

(2) Perenggan-perenggan dalam kenyataan tuntutan terpinda yang dirujuk oleh responden-responden tidak cukup untuk membentuk pliding keutamaan tidak wajar. Responden-responden, dalam hujahan mereka,
E bergantung pada permohonan *omnibus* yang 'pengaruh tak wajar' termaktub dalam perenggan-perenggan. Walau bagaimanapun, permohonan *omnibus* bukan klausa yang diplidkan. Fakta yang menunjukkan keutamaan tak wajar sepatutnya diplid secara spesifik. Dalam keadaan ini, sebahagian perintah hakim bicara boleh disangkal
F kerana beliau menyimpang daripada pertikaian litigan-litigan seperti dalam pliding-pliding. Oleh itu, hakim bicara terkhilaf dalam kegagalan beliau mempertimbangkan sifat peruntukan dalam s. 293 AS dan s. 53 AK.

Rayuan No 1229

G

Oleh Abang Iskandar HMR (menolak rayuan):

(1) Responden-responden dikehendaki memberi keterangan terhadap standard pembuktian yang lebih tinggi daripada atas imbangan kebarangkalian dan yang mana lebih dekat dengan beban membuktikan
H kes melampaui keraguan munasabah. Seksyen 304(1) AS memperuntukkan tuntutan sivil terhadap pengarah yang menyeleweng atas alasan perniagaan secara penipuan. Subseksyen (5) kepada s. 304 memberikan pengatur, kuasa untuk mendakwa orang tersebut dan orang tersebut, jika didapati bersalah oleh mahkamah, akan dijatuhkan
I hukuman jenayah. Oleh itu, walaupun s. 304(1) AS memperuntukkan satu landasan bagi tuntutan sivil, sub-s. (5), memberi kuasa kepada pengatur untuk menjadikan kelakuan yang dipersoalkan itu sebagai satu

jenayah kepada mana-mana orang sedemikian. Ia memperuntukkan pelbagai jenis tindakan yang mungkin terhadap orang sedemikian. Oleh itu tidak ada merit dalam hujahan bahawa s. 304 AS bersifat jenayah.

(2) Tiada merit dari sudut undang-undang berkaitan standard pembuktian yang betul yang perlu dilaksanakan oleh responden-responden seperti yang dibangkitkan oleh Sahgal. Jika hakim bicara terkhilaf mengenai standard pembuktian yang diguna pakai, beliau sebenarnya terkhilaf dalam menyebelahi Sahgal, apabila beliau meletakkan standard yang lebih tinggi terhadap keterangan plaintif, sedangkan dari segi undang-undang, standard yang lebih rendah, iaitu atas imbangan kebarangkalian, sudah memadai. Oleh itu, tiada ketidakadilan berlaku kepada Sahgal dalam hal keadaan itu lantas tiada kekhilafan yang boleh dirayu yang mewajarkan campur tangan rayuan.

(3) Seksyen 304(1) AS mengkehendaki bukti bahawa orang yang menyeleweng mesti ditunjukkan bertanggungan dalam menjalankan perniagaan secara yang menipu pemiutang-pemiutang syarikat itu. Menjalankan perniagaan dengan pengetahuan bahawa syarikat itu mampu membayar kemudian semata-mata tidak mencukupi untuk membangkitkan subseksyen itu. Mesti ada bukti serta unsur ketidakjujuran oleh pelaku yang dipersoalkan apabila perniagaan sedemikian dijalankan. Keterangan dalam kes ini menunjukkan dengan jelas banyak keadaan oleh Sahgal di mana unsur ketidakjujuran boleh dikaitkan dengannya.

(4) Tindakan CNLT, melalui Sahgal, yang ketika itu adalah pengarah urusan, dirancang untuk menipu pemiutang-pemiutang. Dia tidak jujur dalam urusannya, menyebabkan pemiutang-pemiutang ditipu. Dia menjalankan urusniaga yang mempunyai objektif-objektif yang meragukan yang mana bukan sahaja mempunyai kesan buruk ke atas CNLT sendiri, tetapi ia juga memberi kesan menipu pemiutang-pemiutang dengan mengatakan bahawa CNLT ialah perniagaan yang masih beroperasi agar pemiutang-pemiutang meneruskan perniagaan dengan CNLT, walaupun sebenarnya, ia telah muflis. Selanjutnya, bayaran yang dibuat kepada JCT ialah urus niaga perniagaan yang dijalankan oleh Sahgal untuk menipu pemiutang-pemiutang, kerana mereka jelas dinafikan bayaran balik pinjaman mereka kepada CNLT. Oleh itu, hakim bicara dijustifikasikan dalam membuat perintah berbangkit terhadap JCT untuk membayar balik wang, yang dibayar secara mencurigakan kepadanya, kembali kepada penyelesai sementara CNLT.

(5) Terdapat bukti kukuh untuk menunjukkan bahawa CNLT, melalui Sahgal, menjalankan perniagaan dengan niat menipu pemiutang, termasuk plaintif-plaintif. Secara objektif, kesan tindakan Sahgal adalah untuk menipu pemiutang-pemiutang dengan cara mereka tidak dapat menebus pinjaman yang diberikan kepada CNLT. Sekali lagi,

penyaluran wang palsu kepada JCT juga akan menafikan pemiutang-pemiutang dengan dana tersedia yang boleh digunakan untuk membayar pinjaman mereka. Dalam konteks keterangan yang dikemukakan, Sahgal adalah orang yang dibayangkan di bawah s. 304(1) AS di mana deklarasi dibuat dengan betul. Dalam keadaan ini, hujah alternatif Sahgal bahawa dia tidak bertanggungan di bawah s. 304(1) AS juga gagal. Dalam keadaan ini, hakim bicara betul apabila beliau menegaskan bahawa perniagaan CNLT dijalankan oleh Sahgal dengan niat untuk menipu pemiutang-pemiutang menurut s. 304 AS.

Case(s) referred to:

Aktieselskabet Dansk Skibsfinansiering v. Brothers and Ors [2001] 2 BCLC 324 ***(refd)***
Ang Hiok Seng v. Yim Yut Kiu [1997] 1 CLJ 497 FC ***(refd)***
Birbra Lake Holdings Pty Ltd (in liq) v. Firmadoor Australia Pty Ltd (t/as Cleveland Industries WA) [1992] 7 ACSR 380 ***(refd)***
Boustead Trading (1985) Sdn Bhd v. Arab-Malaysia Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***
Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(refd)***
In re Sarflax Ltd [1979] 2 WLR 202 ***(refd)***
R v. Home Secretary, ex p Khawaja [1984] AC 74 ***(refd)***
R v. Grantham [1984] 2 All ER 166 ***(refd)***
Re Augustus Barnett & Sons Ltd [1986] BCLC 170 ***(refd)***
Re Sateras Resources (Malaysia) Bhd [2006] 2 CLJ 489 CA ***(refd)***
Re William C Leitch Brothers Ltd [1932] 2 Ch 71 ***(refd)***
RHB Bank Bhd v. Kwan Chew Holdings Sdn Bhd [2010] 1 CLJ 665 FC ***(refd)***
Sime Diamond Leasing (Malaysia) Sdn Bhd v. JB Precision Moulding Industries Sdn Bhd [1998] 4 CLJ 557 FC ***(foll)***
Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584 FC ***(foll)***
Siow Yoon Keong v. H Rosen Engineering BV [2003] 4 CLJ 68 CA ***(foll)***

Legislation referred to:

Bankruptcy Act 1967, s. 53
Companies Act 1965, ss. 176, 293, 304(1), (5)

(Civil Appeal No: W-02(NCC)(W)-1228-07-2014)

For the appellant - Ariff Rozhan (William Lim Wee Chong, Johnson Lim Fung Tat, Muhammad Izzat Md Jonid with him); M/s Ariff Rozhan & Co
For the respondents - Wong Rhen Yen (Eric Tan, Emily Goh, Ahmad Ezmeel, Emily Wong with him); M/s Ong Kok Bin & Co

(Civil Appeal No: W-02(NCC)(W)-1229-07-2014)

For the appellant - Gurdit Singh (Saaran Nadarajah with him); M/s Saaran & Co
For the 1st - 83rd respondents - Wong Rhen Yen (Emily Goh with him); M/s Ong Kok Bin & Co
For the 84th respondent - M Menon (S Ravenesan with him); M/s S Ravenesan

[Editor's note: For the High Court judgment, please see Muniandy Nadasan & Ors v. Dato' Prem Krishna Sahgal & Ors [2014] 1 LNS 640 (overruled).]

Reported by S Barathi

JUDGMENT

David Wong Dak Wah JCA:

Introduction

[1] This is an appeal against the decision of the High Court in which the learned judge allowed the plaintiffs/respondents' claims that certain payments channelled to the eighth defendant/appellant were fraudulent preference payments and void.

[2] We heard this appeal together with another appeal which is W-02-(NCC)(W)-1229-07-2014 (appeal 1229). Both appeals emanated from the same judgment given in Suit 22(NCC)-68-68-01-2013.

[3] The appellant in this appeal is the eighth defendant in the aforesaid suit while the appellant in appeal 1229 is the first defendant, one Dato' Prem Krishna Sahgal.

[4] After hearing parties on 6 May 2015, we reserved judgment and we now give our decision and grounds of the same.

[5] Despite having heard the two appeals together, we see fit that separate judgment be given for each appeal as it concerns different area of law.

Background Facts

[6] The factual matrix has been succinctly set out by my learned brother, Justice Abang Iskandar bin Abang Hashim in his judgment for appeal 1229 and I adopt them with the necessary amendments.

[7] The respondents were the employees of CNLT (Far East) Berhad, the ninth defendant (CNLT) which carries the business of manufacturing and sale of yarn. CNLT was wound up on 16 January 2009 and in liquidation now.

[8] The first to sixth defendants were all the directors of CNLT. The seventh defendant, who did not enter an appearance in this action, was at all material times, the human resources manager of CNLT. The eighth defendant, JCT Limited is an Indian incorporated company and is a substantial shareholder in CNLT.

[9] The first defendant was at all material times the executive managing director of CNLT and for all intents and purposes the controlling mind of CNLT. He is of Indian nationality.

[10] The claim of the respondents was for arrears of salary and workers' compensation in the sum of RM2,910,201.78 relying on the cause of action of the tort of conspiracy to injure.

[11] The particulars of the respondents' cause of action were these. CNLT provided the solvency declaration to the Kuala Lumpur Stock Exchange (BURSA) showing that they were solvent when in fact they were not, hence misleading the respondents who were then creditors, BURSA as well the general public.

[12] It is also alleged that the appellant in appeal 1229 and the rest of defendants, despite the fact of their knowledge that CNLT was insolvent and a non-going concern, continued to mislead the employees, creditors, investors and general public that CNLT was a going concern so as to enable it to continue to trade and be given credit facilities, by unsuspecting creditors and suppliers.

[13] Further from March 2008 till 16 January 2009 (the date when CNLT was finally wound up), no payment was made to the respondents. However on 30 April 2008 and 10 May 2008 a memoranda was issued to the respondents placing them on full pay and assuring them that their contracts of employment would continue in force.

[14] The memoranda according to the respondents amounted to a deception as the appellant in appeal 1229 and the rest of the defendants knew full well that there would be no payment coming.

[15] Premised on those particulars, the respondents filed this suit seeking a declaration that the business of CNLT had been carried out with intent to defraud the creditors of CNLT and the declaration that the defendants were liable for all the debts or liabilities of CNLT.

High Court Decision

[16] The learned judge sustained the respondents' claims and made the following orders:

(a) The plaintiffs are entitled to a declaration that the business of CNLT (Far East) Berhad was carried on by Sahgal with intent to defraud the creditors of CNLT including plaintiffs pursuant to s. 304 of the Companies Act 1965;

(b) The plaintiffs are hereby granted a declaration that Sahgal is personally liable to the employees of CNLT and is hereby ordered to pay the outstanding debt due and owing to the plaintiffs in the sum of RM2,910,201.78 as set out in sch. 2 of the statement of claim.

(c) The plaintiffs are granted interest at the rate of 5% per annum from the date of judgment to the date of final settlement, payable by Sahgal;

(d) There is no declaration granted under s. 304 in respect of any of the other defendants or directors of CNLT;

(e) An order is hereby made by this court that all payments channelled to JCT Limited which amount to fraudulent preference as outlined above are hereby declared void;

(f) An inquiry/assessment by the liquidator for an account of monies siphoned or channelled to JCT Limited by Sahgal;

(g) An order for the repayment by JCT Limited of those monies wrongfully channelled to or dissipated by Sahgal to JCT Limited be made to the liquidators for distribution amongst the body of unsecured creditors in accordance with the law;

(h) The costs of this action are to be borne by the defendants, jointly and severally in a sum to be assessed by this court after hearing submissions on the same.

Our Grounds Of Decision

Preliminary Objection

[17] Prior to the hearing of the appeal, we had dealt with a motion by CNLT, who is the ninth defendant, to strike out this appeal on the ground that they were not made a co-respondent in this appeal. As CNLT is under liquidation, CNLT appeared before us pursuant to a court order dated 17 March 2015 from the winding up court authorising Vaaibz Pte Ltd, a creditor of CNLT and Alok Kumar Sarda, a contributory of CNLT, to conduct this litigation on behalf of CNLT. We have some doubt as to the validity of this order as CNLT can only be represented by the liquidator who was present in court and informed the court he takes a neutral stand on the outcome of the litigation. Be that as it may, as this order was not challenged by the appellant, we heard the motion.

[18] The crux of this motion is that CNLT will be affected by the orders made by the learned judge, they must be made a co respondent. Learned counsel referred us to the case of *Re Sateras Resources (Malaysia) Bhd* [2006] 2 CLJ 489; [2006] 3 MLJ 140 where the Court of Appeal held as follows:

> In the present appeal before us by Sateras, by not citing the applicant as a Respondent, being one of the interveners in the Court below, and necessarily a party in the proceeding, his status and legal rights would be directly affected by any substantive decision in the appeal, if we were to go on hearing the appeal on merits. In the event that the decision in the appeal goes against its interest, the problem would await them in the Federal Court when an attempt is made to seek the leave of the Federal Court to appeal against the decision made by this Court. Also, the applicant in the course of the proceedings in the Court below had incurred costs in opposing the petition. By not having been cited as a Respondent in this appeal, it would be facing a problem when it comes to the question of its costs against the Appellant.

[19] Further, learned counsel submitted that CNLT would have no recourse to the Federal Court should this court make a decision against CNLT and hence would be prejudicial to them.

[20] In opposing this motion learned counsel for the appellant submitted that the appellant in this appeal is only concerned with paras. (e), (f) and (g) of the orders of the High Court. It was submitted that nowhere in those orders refer to CNLT. They are orders made concerning the liquidator of CNLT and not CNLT or their creditors. Learned counsel refers us to the case of *Birbra Lake Holdings Pty Ltd (in liq) v. Firmadoor Australia Pty Ltd (t/as Cleveland Industries WA)* [1992] 7 ACSR 380 where the Supreme Court of Western Australia held as follows:

> Moneys paid in circumstances which create an undue preference, and which are recoverable under s 451(1), are moneys which are recoverable for the benefit of the creditors and contributories. Such moneys cannot be said to have been the property of the company and nor are they owned by the recipients thereof as a debt to the company. Accordingly, the following words of Lord Davey in *Kent v. La Communaute Des Soeurs De Charite De La Providence* [1903] AC 220 at 226 are apposite to a claim brought under s. 45191): "It is appropriate for the liquidator to sue in his name in the interests of the creditors and contributories to impeach some act or deed of the company committed for winding up"

[21] As CNLT is in liquidation we see merits in the contention of learned counsel of the appellant. Furthermore, liquidators had not taken part in the proceeding in the High Court.

[22] Upon the aforesaid reasons, we dismissed the motion – encl. 9a and proceeded with the appeal proper.

Appeal Proper

[23] To recap, in this appeal we are concerned only with the following orders of the High Court:

(a) All payments channelled to the appellant which amount to fraudulent preference are declared void;

(b) An inquiry/assessment by the liquidator for an account of monies channelled or siphoned to the appellant by the first defendant (at the High Court);

(c) An order for the repayment by the appellant of those monies wrongfully channelled to or dissipated by the first defendant (at the High Court) to the appellant to be made to the liquidators for distribution amongst the body of unsecured creditors in accordance with the law.

[24] The grounds of appeal as contained in the Memorandum of Appeal and summarised by learned counsel for the appellant are as follows:

(a) The learned judge erred in law and failed to appreciate that the provisions of s. 293 of the CA read together with s. 53 of the BA are only applicable or relevant to the liquidator;

(b) The learned judge erred in law and failed to appreciate that the issue of undue preference (under s. 293 of the CA read together with s. 53 of the BA) was not specifically pleaded by the respondents and as such, the respondents are precluded from raising the said issue;

(c) The learned judge erred in law and/or in fact in finding that CNLT's payments of USD1,250,000 to the appellant were preferred repayment to an unsecured creditor, in preference over the rest of the body of unsecured creditor.

[25] This appeal can be dealt with by deliberating on these issues:

(a) Was undue preference under s. 293 of the Companies Act 1965 (CA) read together with s. 53 of the Bankruptcy Act (BA) specifically pleaded by the respondent?

(b) If the answer to issue 1 is in the negative, was the learned judge correct to make a finding of undue preference payment under s. 293 of the CA together with s. 53 of the BA?

Issue 1

[26] It is the argument of the appellant's counsel that what the learned judge ordered in so far as "undue preference" payment to JCT cannot be reconciled to what had been prayed for in the re-amended statement of claim. For clarity the prayers sought are as follows:

(a) A declaration that the businesses of CNLT (Far East) Berhad (company No: 13856 – You (CNLT) have been carried on by the defendants with intent to defraud creditors of CNLT, in particular the plaintiffs pursuant to s. 304 of the Companies Act 1965;

(b) A declaration that the defendants shall be jointly and/or severally liable and personally responsible, without any limitation of liability, for all of the debts or other liabilities of CNLT;

(c) An order that the defendants, jointly and/or severally do pay the outstanding debt due and owing to the plaintiffs by CNLT, as pleaded in the second schedules

(d) General damages to be assessed by this Honourable Court;

(e) Interest at the rate of 5% per annum from 16 January 2009 (the date of the winding up order) on the decreed sum allowed by this Honourable Court until full settlement thereof;

(f) Costs on a solicitor-client basis;

(g) Costs of this action;

(h) Further order and/or other relief, which this honourable court may deem fit and fair in the circumstances of this case.

[27] Counsel for the respondents however refer the court to paras. 16.20 (iv) and 18.3 of the re-amended statement of claim which respectively read as follows:

> 16.20 (iv) – Dissipation of asset to JCT
>
> (a) In June 2007, two months before the presentation of the first winding up petition on 13 August 2007 CNLT remitted the sum of USD1,250,000 to the eighth defendant purportedly to settle JCT's loan to CNLT.
>
> (b) At the material time, no announcement on the above payment to JCT was made to the relevant authorities as required under the listing requirements and/or law.
>
> 18.3
>
> Engaging and/or carrying on and/or undertaking the business of CNLT by settling its debt with its preferred and/or related creditors when CNLT was insolvent in breach of the law.

[28] Premised on those pleadings, counsel for the respondents submit that it is not correct to say that undue preference payment was not pleaded. Further it was submitted that the appellant never objected to the allegations at trial and is estopped from raising the objection here relying on the case of *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysia Merchant Bank Bhd* [1995] 4 CLJ 283; [1995] 3 MLJ 331.

[29] The relevant paragraph of the learned judge's grounds on this issue is at para. 135 where she said as follow:

> 135. This then was Sahgal's evidence when tested on the issue of whether the USD1.25 million was the repayment of a loan to JCT Limited or whether it was a refund and compensation. It is clear to my mind that the payment of USD1.25 million to JCT Limited was a preferred repayment of an advance to an unsecured creditor and shareholder in preference over the rest of the body of unsecured creditors. It contravened section 293 of the Companies Act 1965 read together with section 53 of the Bankruptcy Act 1967. I so concluded because I found Sahgal's evidence to be entirely implausible for the following reasons:
>
> (i) There is no documentary evidence substantiating this alleged order for ordinary as well as 'specialised' yarn from JCT Limited. There is only Sahgal's oral evidence;
>
> (ii) There is no documentary evidence in relation to the alleged late supply of such yarn. In fact there is no evidence that JCT Limited required this yarn as of February 2007;
>
> (iii) There is no written demand from JCT Limited for compensation for such alleged late delivery. On the contrary there is simply nothing in writing on this subject between the two entities, CNLT and JCT;

(iv) There was no discussion at the board level in CNLT in relation to the issues of either a refund of the sum of USD890,000.00 or compensation of USD360,000.00. It would be expected that a decision to refund such large sums of money and to voluntarily pay out compensation of USD360,000.00 particularly in a company which had just declared itself to be in a financially precarious situation would require serious deliberation, not to mention disclosure to several authorities;

(v) These payments were not disclosed to the Audit Committee. In this context therefore Izham and Ishah had no knowledge of such disbursements;

(vi) The decision to allegedly 'refund' and 'compensate' JCT Limited could only come from Sahgal and the resident Indian Directors or one or more of them;

(vii) These payments were not recorded in the audited accounts of either CNLT or JCT Limited;

(viii) No announcement was made to Bursa in relation to these substantial payments out to CNLT's largest shareholder;

(ix) These payments out to JCT Limited were made after it was announced that CNLT had been classified as a PN17 company and after the announcement that it had suffered substantial losses for the first quarter of 2007;

(x) Man Mohan Thapar, D2, had written a letter on 29 March 2007 to CIMB, a secured lender of CNLT seeking support and confirming that RM3.2 million had been brought in by shareholders in December 2006. This is exactly the amount which was remitted by JCT Limited to CNLT in the form of USD890,000.00. However Sahgal chose to explain these monies as having been remitted for the purchase of goods by JCT Limited from CNLT. In other words D2's letter too evidences the fact that the sum of USD890,000.00 was a shareholder advance by JCT Limited to meet the flailing needs of CNLT;

(xi) This sum of money was reported as a shareholder advance from JCT Limited in CNLT's 2006 annual report;

(xii) Despite the recording of these monies as an advance from JCT Limited there is no record of these monies having been remitted back to JCT in June 2007. Neither is there any corresponding reduction shown in JCT Limited's shareholder advances;

(xiii) There is no explanation forthcoming from JCT Limited in respect of this entire transaction as no witnesses testified on its behalf. Instead it relied on the evidence of Sahgal.

136. It would appear that having sent RM3.2 million odd by way of shareholder advances in December 2006, seemingly to prop up a failing CNLT, Sahgal ensured that these monies were remitted back to JCT

A Limited through these undocumented repayments in June 2007. Such payments clearly contravene many aspects of insolvency law as I have pointed out earlier.

137. It appears to this Court that allegation no (iv) is made out. This amounts to a dissipation or siphoning out of CNLT's assets without
B disclosure to the auditors, Bursa or any relevant authority. It was entirely a matter between JCT Limited and CNLT.

[30] We have no doubt that the learned judge was correct in her analysis of the factual matrix in coming to the conclusion that she did. What confronts us is whether she had the jurisdiction to make such findings when there is
C no such specific pleadings by the respondents.

[31] The law pertaining to the court's power, concerning an unpleaded cause of action is clear and suffice for us to refer to the case of *RHB Bank Bhd v. Kwan Chew Holdings Sdn Bhd* [2010] 1 CLJ 665; [2010] 2 MLJ 188, where the Federal Court held the following:

D The respondent's cause of action against the appellant was for breach of contract. Nowhere in the respondent's pleading, expressly or by implication, can we detect a claim for breach of a joint venture agreement arising out of a fiduciary duty placed upon the appellant in the capacity as principal of an agent. It is a cardinal rule in civil litigation that the
E parties must abide by their pleadings ...

On this, we would like to add that it is not the duty of the court to invent or create a cause of action or a defence under the guise of doing justice for the parties lest it be accused of being biased towards one against the other. The parties should know best as to what they want and it is not for the court to pursue a cavalier approach to solving their dispute by
F inventing or creating cause or causes of action which were not pleaded in the first place. Such activism by the court must be discouraged otherwise the court would be accused of making laws rather than applying them to a given set of facts.

[32] It is undisputed that when evidence was led on this matter of undue
G preference, there was neither objection nor rebuttal to the evidence proffered by the respondents. That said, we are of the view that this does not help the respondents as the learned judge cannot with respect grant orders which the respondents did not ask for in their prayers. The appellant with respect had no duty to rebut evidence when they are of no relevance to the premised
H cause of action which in this case is expressly s. 304 of the CA, ie, intent to defraud creditors of CNLT.

[33] With respect the case of *Boustead* relied on by counsel for the respondents is not applicable as in that case it related to an unpleaded cause of action. Here the respondents had premised their action on s. 304 only. We
I find that the paras. 16.20(iv) and 18.3 referred to us by the respondents were insufficient to constitute a pleading for undue preference. Indeed, in the course of his submissions before us, learned counsel for the respondents relied on the omnibus prayer as the premise to convince us that this court

"undue influence" could fall into that clause. With respect, we cannot accede to that submission. The omnibus prayer is not a pleading clause. Facts ought to have been specifically pleaded which would show that there was undue preference, as was now alleged by the respondents and found by the learned trial judge despite the issue was not pleaded to that effect by the respondents.

[34] Accordingly we agree with the appellant's contention that the orders (e) (f) and (g) of the learned judge cannot stand as she had deviated from the litigants' dispute as per the pleadings.

Issue 2

[35] In view of our finding on issue 1, it is not necessary for us to deliberate this issue. Be that as it may, for completeness we will express our view on the same.

[36] It is the contention of the appellant that the learned judge erred when she failed to appreciate that s. 293 of the CA read together with s. 53 of the BA can only be relevant to the liquidator. Hence when the liquidator was not even a party to this suit, these two sections cannot be utilised.

[37] Section 293 CA reads as follows:

> (1) Any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company which, had it been made or done by or against an individual, would in his bankruptcy under the law of bankruptcy be void or voidable shall, in the event of the company being wound up, be void or voidable in like manner.
>
> (2) For the purposes of this section the date which corresponds with the date of presentation of the bankruptcy petition in the case of an individual shall be:
>
> (a) In the case of a winding up by the Court:
>
> (i) the date of the presentation of the petition; or
>
> (ii) where before the presentation of the petition a resolution has been passed by the company for voluntary winding up the date upon which the resolution to wind up the company voluntarily, is passed,
>
> whichever is the earlier; and
>
> (b) In the case of a voluntary winding up the date upon which the winding up is deemed by this Act to have commenced.
>
> (3) Any transfer or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void.
>
> Section 53 BA:
>
> (1) Every conveyance or transfer of property or charge thereon made, every payment made, every obligation incurred and every judicial proceeding taken or suffered by any person unable to pay his debts, as they become due, from his own money in favour of any creditor or any

A person in trust for any creditor shall be deemed to have given such creditor a preference over other creditors if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within six months after the date of making, taking, paying or suffering the same and every such act shall be deemed fraudulent and void as against the Director General of Insolvency.

B

(2) This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt.

(3) For the purposes of this section "creditor" includes a surety or guarantor for the debt due to that creditor.

C

[38] These two provisions were subject of consideration by the Federal Court in the case of *Sime Diamond Leasing (Malaysia) Sdn Bhd v. JB Precision Moulding Industries Sdn Bhd* [1998] 4 CLJ 557; [1998] 4 MLJ 569, where the apex court held the following:

D We must now turn to consider s. 293 of the Companies Act. The law relating to fraudulent preferences is set out in s. 53 of the Bankruptcy Act, which is made applicable to companies by s. 293 of the Companies Act, and is designed to preserve the sanctity of the *pari passu* principle by which creditors in a winding up share rateably in the assets available for distribution …

E

To take the matter further, it is clear law that the Court has no power to make an order setting aside payments and transfer made in the run up to bankruptcy in favour of a particular creditor which were designed to prefer him over other creditors unless the following five conditions are satisfied ...

F

The onus was, of course upon the liquidator to satisfy all the five requirements aforesaid.

… The principle of central importance underlying s. 293(1) of the Act is that where a debtor company, has at a relevant time, given a preference to any person, the liquidator may apply to the Court for an order under the section setting aside the preference.

G

[39] Needless to say we are bound by the judgment of the apex court. That being the case, we are constrained to find that the learned judge had erred in not appreciating the nature of the aforesaid provisions.

H **Conclusion**

[40] This is a case where with respect that the trial judge had deviated from the dispute as framed by the litigants and made orders not asked for by the respondents. That course of action in an adversarial justice system is not allowed for the simple reason that the "goal posts" during the game so to speak cannot be changed.

I

[41] For reasons stated above we allow the appeal with costs in the sum of RM83,000 We also set aside orders (e)(f) and (g) of the High Court. Finally we order the deposit to be refunded.

Abang Iskandar JCA:

Brief Facts Of The Case

[42] All plaintiffs were the employees of CNLT (Far East) Berhad, the ninth defendant ("CNLT"). The CNLT was in the business of manufacture and sale of yarn. CNLT had been wound up on 16 January 2009 and in liquidation.

[43] The first to sixth defendants were all the directors of CNLT. The seventh defendant, who did not enter an appearance in this action, was at all material times, the human resources manager of CNLT. The eighth defendant, JCT Limited, was a company incorporated in India and was a substantial shareholder of CNLT. It was, in fact, CNLT's largest single shareholder.

[44] More specifically, the first defendant, Dato' Prem Krishna Sahgal ("Sahgal") was (and is) at all material times the Executive Managing Director of CNLT. He is an Indian national who has been residing in Malaysia at all material times. He was also effectively in control of CNLT at all material times.

[45] The plaintiffs' claim for arrears of salary and workers' compensation in the sum of RM2,910,201.78 was premised on the tort of conspiracy to injure.

[46] The plaintiffs claimed that the board of directors of CNLT had provided the solvency declaration to the BURSA to show that they were solvent, when actually they were not, thereby misleading the body of creditors, including the plaintiffs and BURSA, as well as the general public.

[47] The plaintiffs further claimed that despite the fact that the defendants were aware that CNLT had been insolvent and ceased to be an ongoing concern since 2003, the defendants kept on misleading the employees, creditors, investors and general public that CNLT was a going concern so to be able to continue to trade and be given credit by unsuspecting creditors and suppliers.

[48] The plaintiffs stated that from March 2008 until 16 January 2009 (the date when CNLT was finally wound up), no payment was given to them. A memorandum was issued on 30 April 2008 and 10 May 2008 to the employees placing them on full pay and assuring them that their contracts of employment continued in force.

[49] The plaintiffs contended that the memorandum issued amounted to a deception to the effect that they would receive their remuneration and benefits in full when it was known to the defendants that there was no likelihood of the employers would be paid.

[50] Therefore, the plaintiffs filed this suit claiming for a declaration that the businesses of CNLT had been carried out with intent to defraud the creditors of CNLT and a declaration that the defendants ought to be liable for all the debts or other liabilities of CNLT personally, as well as damages. It was a claim that was founded on s. 304 of the Companies Act 1965.

[51] The defendants denied any intention to defraud nor were they dishonest, as claimed by the plaintiffs.

[52] The learned High Court Judge allowed the plaintiffs' claim on 13 June 2014. Aggrieved by the said decision, the first and eighth defendants filed these appeals before us.

[53] We had the opportunity to hear parties during submissions at the appeal. It has to be noted that the appellant in case W-02(NCC)(W)-1229-07-2014 ("Appeal No. 1229") had added CNLT as the 84th respondent. While in the case of W-02(NCC)(W)-1228-07-2014 ("Appeal No. 1228") it is not. As a result, a notice of motion, encl. 9a was filed by CNLT in Appeal No. 1228 to strike out the appeal. The main ground of the application has been that the failure of the appellant to name the CNLT as co-respondent in Appeal No. 1228 was fatal as the decision of the High Court dated 13 June 2014 had affected CNLT. After due consideration of the affidavits and submissions by all parties, we had dismissed encl. 9a and had proceeded to hear both appeals on their merit, without CNLT as a co-respondent in Appeal No. 1228.

[54] We had reserved the decisions on these two for deliberation. Our decisions in both these appeals are unanimous.

The Appeals

[55] The grounds of the appellant's appeal in Appeal No 1228 as enumerated in the Memorandum of Appeal, *inter alia*, are as follows:

(a) The learned judge erred in law and failed to appreciate that the provisions of s. 293 of the Companies Act 1965 ("CA") read together with s. 53 of the Bankruptcy Act ("BA") are only applicable or relevant to the liquidator;

(b) The learned judge erred in law and failed to appreciate that the issue of undue preference (under s. 293 of the CA read together with s. 53 of the BA) was not specifically pleaded by the respondents and as such, the respondents are precluded from raising the said issue;

(c) The learned judge erred in law and/or in fact in finding that CNLT's payments of USD 1, 250,000 to the appellant were preferred repayment to an unsecured creditor, in preference over the rest of the body of unsecured creditor.

[56] We had decided to write separate judgments for the two appeals. This court's decision in Appeal No. 1228 is expressed in the judgment written by my learned brother, Justice David Wong Dak Wah whilst this present and immediate judgment encapsulates our decision in relation to Appeal No. 1229.

[57] In Appeal No. 1229, the primary contention of the appellant is that the learned judge had misapprehended the intent underlying, and the scope of s. 304 of CA and had by reason of that misapprehension, she had misdirected herself. In the appellant's written submission, it is contended that:

(a) the learned judge had erred in law in adopting a sliding scale as to the criminal standard of proof in cases of fraudulent trading under s. 304 of CA.

(b) the facts of the case do not support a claim under s. 304 of CA; and

(c) alternatively, the appellant was not responsible for the incurrence of the said debt.

[58] Indeed, before us, learned counsel Dato Malek Imtiaz, acting for the appellant one Dato' Sahgal, in Appeal No. 1229 had emphasised the point that his main contention in this appeal, would be premised on the legal argument as expressed in paragraph 'a' in para. 16 above. To repeat his own words, learned counsel had said, 'my attack is on the law'.

[59] It was contended before us that the learned trial judge had erred with regard to the standard of proof used in determining the quantum of proof required of the respondents to establish the alleged fraudulent trading under s. 304 of CA. It was his contention that s. 304 of CA was a criminal provision and as such, it was incumbent on the respondents to prove their case against the appellant on the standard of proof that is one beyond reasonable doubt. He pointed to the presence of sub-s. (5) to s. 304 of CA to anchor his contention that s. 304 of CA was for all intents and purposes, a criminal provision that ought to attract the operation of a higher burden in order to establish fraudulent trading under sub-s. (1) to s. 304 of CA. His complaint was premised on the statement by the learned trial judge on the attendant degree of proof that was incumbent on the respondents to prove their claim as follows at p. 19:

> 44. In other words the degree of proof ought to be something well beyond a balance of probability and more akin to the standard of beyond reasonable doubt.

[60] From a perusal of the paragraphs devoted by the learned trial judge to this issue, it is clear to us that she had correctly directed her mind to the fact that the case that she was dealing with had been a civil case. The critical consideration before Her Ladyship had involved the element of fraudulent

trading as it had been concerned with a claim by the respondents premised upon s. 304 of CA. She had gone on to cite the case of *R v. Home Secretary, ex p Khawaja* [1984] AC 74 where Lord Scarman had said:

> A preponderance of probability suffices but the degree of probability must be such that the court is satisfied.

[61] Those words by Lord Scarman had led her to surmise that the burden of proof obtaining in the case before her required that the respondents would have to lead evidence that is higher than the one on the balance of probabilities and one that was nearer to the burden of proving the case beyond reasonable doubt. We noted throughout her judgment that the learned trial judge had been very aware as well as she was very careful in her appreciation of the evidence before coming to the conclusion that she did. Right until the end of her decision, the learned trial judge again reiterated the degree of the burden of proof which she had subjected the evidence to as led before her when arriving at her conclusions on the findings of facts. This can be seen at p. 98 of her decision, when she said:

> I should also specify that in arriving at these conclusions I have applied a standard of proof higher than that of a balance of probabilities.

[62] But learned counsel for the appellant had submitted before us that she had misdirected herself on the proper burden that ought to be in play. According to him, even if the sub-s. 304(1) of CA was civil in nature, the correct burden to be applied in this case ought to be the criminal burden, namely one that is proof beyond reasonable doubt. That is because the claims by the plaintiffs had been concerned with carrying on business with fraudulent intent to defraud them as creditors. Based on that, learned counsel for the appellant had contended that the standard of proof that was applicable was the one that was beyond reasonable doubt.

[63] Having considered the submissions of parties on this issue, we are of the respectful view that the learned trial judge had correctly treated s. 304(1) of CA as a provision that provides for a civil claim against an errant director on the ground of fraudulent trading. If successful, the court may order that the errant person to pay compensation to the injured party or parties.

[64] Learned counsel for the appellant had, among others, adverted our attention to the existence of sub-s. (5) to s. 304 of CA whereby the former subsection had provided for penal sanctions for 'a person who was knowingly a party to the carrying on the business with that intent or purpose shall be guilty of an offence against this Act'. According to him, that provision has effectively made s. 304 of CA a criminal provision and thereby requiring a corresponding discharge by the respondents of the criminal burden of proof that is beyond reasonable doubt.

[65] With respect, we are not able to agree with such submission by learned counsel for the appellant. To our mind, sub-s. (5) to s. 304 of CA is a separate provision whereby it gives the regulator the necessary power to

prosecute such a person so described there under and such person, if found guilty by the court, could be staring at the penal sanctions as spelt out thereunder. To our mind too, while sub-s. (1) to s. 304 of CA provides a platform for a civil claim to be pursued, sub-s. (5) on the other hand empowers the regulator to criminalise such impugned conduct on the part of any such person. They provide for a different kind of possible action against such a person. And yes, they co-exist in the same s. 304 of CA *albeit* in different sub-sections. This statutory arrangement is actually immediately recognised by sub-s. (6) to s. 304 of CA itself. That sub-s. (6) reads as follows:

> (6) This section shall have effect notwithstanding that the person concerned is criminally liable apart from this section in respect of the matters on the ground of which the declaration is made.

[66] To our mind, it cannot be more clear than that. Section 304 of CA is a hybrid provision providing for both civil remedies as well as criminal sanction. But that does not matter for much, as was stated by the Court of Appeal in the case of *Siow Yoon Keong v. H Rosen Engineering BV* [2003] 4 CLJ 68; [2003] 4 MLJ 569 ("*Siow Yoon Keong* case") where it was held:

> We are of the view that the issue is the interpretation of s. 304(1) and whether the facts of this case fall within the meaning of that subsection. It does not matter whether the relationship between Rosen and Ventura is one of principal and agent or otherwise. It does not matter whether the section carries both civil and criminal liabilities. It does not matter whether there are other remedies. The question is whether on the facts, the case falls within the ambit of s. 304(1) or not and whether this is a fit and proper case for the learned Judicial Commissioner (as he then was) to make the declaration that he did.

[67] As such, we see no merit in the contention that the s. 304 of CA is criminal in nature. In fact, it contains provisions that give rise to both civil in nature as is contained under s. (1) for a declaration, and a criminal prosecution as is contained under the provisions of sub-s. (5) therein. The operative burden of proof will be triggered depending on which of these 2 sub-sections is being invoked before the court for determination. There is complete harmony in the provisions as contained in s. 304 of CA. For learned counsel to conclude that s. 304(1) of CA requires proof beyond reasonable doubt, to our mind, cannot therefore be sustained. We are with the learned trial judge that the case before her had been a civil case and that the burden on the respondents was not one that was beyond reasonable doubt.

[68] Now, under the law, at least, in most common law jurisdictions, there are only two kinds of standard of proof to be discharged, in settling a dispute before the courts, one of which ought to apply on the party which desires judgment to be given in its favour by the court. In a civil case, the plaintiff carries the burden of proving its case on the balance of probabilities. In fact, the defendant in the same civil case also shoulders the same burden of proof to convince the court of its case in order to get a favourable decision

at the end of the day. In a criminal trial, the prosecution carries throughout the case, the burden of having to prove its case against an accused person, on a standard that is beyond reasonable doubt, before the accused person can be found guilty and be convicted of the charge.

[69] This court notes that somehow, when the civil case has been concerned with the element of fraudulent conduct as alleged against the defendant by the plaintiff, the burden of proof which the plaintiff has to discharge is one that is higher than on the balance of probabilities but lower than beyond reasonable doubt. There appears to be a standard that exists in the middle, in between the two standards of proof. There had been cases, where the courts had ruled that for the purpose of proving fraud or adultery in a divorce case in a civil claim, the plaintiff there would have to prove it on the balance of probabilities, but towards a higher end of the band, within the 'on the balance of probabilities standard.' That was what the learned trial judge had done in this case. In fact, such cases, involving fraud in a civil case until recently, had attracted proof beyond reasonable doubt. We therefore could appreciate fully, the slight predicament that the learned trial judge had faced in dealing with issue on the standard of proof in the course of hearing and trying this case where the central issue involved the alleged fraudulent trading on the part of the appellant. It is in this respect that learned counsel for the appellant had contended that the burden of proof that was in play ought to be one that is beyond reasonable doubt. Indeed, the case of *Ang Hiok Seng v. Yim Yut Kiu* [1997] 1 CLJ 497; [1997] 2 MLJ 45 was cited in support for that proposition, where the Federal Court had held, at pp. 517-518 (CLJ); pp. 59-60 (MLJ) as follows:

> From the wide definition of 'fraud' under s. 17 of the Contracts Act 1950 as well as leading authorities on the subject, where the allegation of fraud in civil proceedings concerns criminal fraud such as conspiracy to defraud or misappropriation of money or criminal breach of trust, it is settled law that the burden of proof is the criminal standard of proof beyond reasonable doubt, and not on the balance of probabilities. It is now well established that an allegation of criminal fraud in civil or criminal proceedings cannot merely be based on suspicion or speculation.

[70] But be that as it may, the position is now settled. Our apex court had recently, in the case of *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584 ("*Sinnaiyah* case") ruled that in civil cases involving proof of fraud or fraudulent conduct, the plaintiff would need only to prove his case on the balance of probabilities. We quote learned Justice Richard Malanjum CJ (Sabah and Sarawak) in the *Sinnaiyah* case *(supra)*, where he had said, at para. 52 as follows:

> [52] We therefore reiterate that we agree and accept the rationale in *In re B (Children) (supra)* that in a civil claim even when fraud is alleged the civil standard of proof, that is, on the balance of probabilities, should apply. And perhaps it is not out of place here to restate the general rule

at common law that, "in the absence of a statutory provision to the contrary, proof in civil proceedings of facts amounting to the commission of a crime need only be on a balance of probabilities.

[71] We are of the view that the proper standard of proof, required to be proved as stated by the apex court in the *Sinnaiyah* case *(supra)* in a civil case involving allegation of fraud is applicable to this case. This is because this case, being an on-going appeal, is therefore, still a 'live' case, as opposed to those cases which had been finally adjudicated in terms of their final appeals. To our mind, that was what the apex court had meant when it said that the ruling did not have a retrospective effect. It does not apply to cases that had been finally decided. It is our considered view that all the cases pending disposal in the appeal courts would qualify as 'future' cases referred to in the *Sinnaiyah* case *(supra)* because it would be incongruous indeed for the appeal courts to apply a wrong law in deciding those cases which final fate have not yet been finally determined. All cases which are pending final disposal of their appeals, are therefore included in the so-called 'future cases' in the *Sinnaiyah* case *(supra)*. In other words, the operative standard in this case is the normal civil standard of proving on the balance of probabilities.

[72] Premised on the above, we therefore find that there is no merit in the legal point pertaining to the proper attendant standard of proof to be discharged by the respondent as raised by learned counsel for the appellant. If ever, the learned trial judge was in error with regard to the standard of proof in play, she had in fact erred in favour of the appellant, when she had subjected the plaintiffs' evidence before her against a higher standard, when in law, the lower standard, namely on the balance of probabilities ought to have sufficed. As such, no injustice had been occasioned to the appellant in the circumstances. There was therefore no appealable error that would have otherwise required our appellate intervention.

[73] Learned counsel for the appellant had also raised the complaint before us that the learned trial judge had given too wide a latitude pertaining to the reach of s. 304 of CA.

[74] Before we proceed further, we find it opportune here to reproduce section 304 of CA which reads as follows;

(1) If in the course of the winding up of a company or in any proceedings against a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court on the application of the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do, declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.

(2) Where a person has been convicted of an offence under subsection 303(3) in relation to the contracting of such a debt as is referred to in that section the Court, on the application of the liquidator or any creditor or

A contributory of the company, may, if it thinks proper so to do, declare that the person shall be personally responsible without any limitation of liability for the payment of the whole or any part of that debt.

(3) When the Court makes any declaration pursuant to subsection (1) or (2), it may give such further directions as it thinks proper for the purpose B of giving effect to that declaration, and in particular may make provision for making the liability of any person under the declaration a charge on any debt or obligation due from the company to him, or on any charge or any interest in any charge on any assets of the company held by or vested in him or any corporation or person on his behalf, or any person claiming as assignee from or through the person liable or any corporation C or person acting on his behalf, and may from time to time make such further order as is necessary for the purpose of enforcing any charge imposed under this subsection.

(4) For the purpose of subsection (3) "assignee" includes any person to whom or in whose favour by the directions of the person liable the debt, D obligation, or charge was created, issued or transferred or the interest created, but does not include an assignee for valuable consideration, not including consideration by way of marriage, given in good faith and without notice of any of the matters on the ground of which the declaration is made.

E (5) Where any business of a company is carried on with the intent or for the purpose mentioned in subsection (1) every person who was knowingly a party to the carrying on the business with that intent or purpose shall be guilty of an offence against this Act. Penalty: Imprisonment for three years or ten thousand ringgit.

(6) This section shall have effect notwithstanding that the person F concerned is criminally liable apart from this section in respect of the matters on the ground of which the declaration is made.

(7) On the hearing of an application under subsection (1) or (2) the liquidator may himself give evidence or call witnesses.

G **[75]** It was the contention of learned counsel for the appellant that s. 304(1) of CA is meant to apply in a situation where there already existed creditors when the impugned and fraudulent conduct was allegedly committed by the errant director. It was the appellant's case that the respondents only became creditors in 2008 when it was admitted that the CNLT was not able to pay them, as employees of CNLT, their salaries for H March and April in 2008 despite an assurance that they were to be paid their salaries by CNLT.

[76] The appellant had complained because the learned trial judge had gone way back in point of time to consider the conduct of the appellant in 2007 as well. That according to learned counsel was unwarranted.

I **[77]** We had looked at the records of appeal and what we saw was that the EPF contributions from the respondents in 2007 though deducted from their salaries were nevertheless not remitted to the employees' provident

fund. Neither were CNLT's contributions in respect of the respondent employees remitted to the said fund. Yet during these times, the CNLT, primarily through acts attributable to the appellant, who was then the Managing Director of CNLT, had continued to do business, in order to exhibit to the creditors that it was a going concern when in fact, it was not. That is an incidence of fraudulent carrying on of business. In fact, there was direct evidence as to the intention of the appellant to defraud the creditors way back in 2006, if not in 2004 when he told Man Mohan Thapar, D2, that it was his intention to make it appear that CNLT was seen as a going concern to the creditors when in fact it was not. (See p. 52 of the learned trial judge's GOJ).

[78] The fact that the respondents were entitled to the sum as prayed in their statement of claim ("SOC") could not be disputed as the liquidators had accepted their proof of debt forms, thereby acceding to and confirming that these monies were due and owing to the respondents. In the words of the learned trial judge:

> In short the claims of the employees have been accepted as valid debts under the law. They rank however, as unsecured creditors.
>
> This can be seen at page 7 of her Grounds of Judgment.

[79] To our mind, the law on s. 304 CA has been discussed by the Court of Appeal in the case of *Siow Yoon Keong*'s case. The case is important as it stated two important points in relation to that section. The first point relates to the use of the phrase "if it appears" which, according to the learned appeal justices would indicate a lower threshold in order to trigger its operation. Bearing in mind that this is a civil claim, the burden on the plaintiff to establish its case is lower than if it had been a criminal charge. The second point has been the fact that their Lordships had made a finding that it does not matter whether s. 304 of CA contains in it both civil and a criminal provision. If such has been the intention of Parliament as so reflected in the section, there is nothing amiss about it. What is clear to our mind is that the civil provision in sub-s. (1) and the criminal sanction in sub-s. (5) are properly carved out and they do not interfere in each other's operation. Such a drafting landscape with regard to s. 304 of CA may have been a result of its historical legislative journey in the UK. But whatever it is, its present statutory form must necessarily be given its desired effect. The *Siow Yoong Keong*'s case *(supra)* has given it such effect and, with respect, we see no reason to differ from the opinion expressed by that former bench of this court in that case.

[80] What s. 304(1) of CA requires to be proved is that the errant person must be shown to be the person who was responsible to doing business of the company in such a manner so as to defraud the creditors of the company.

[81] We now revert to how the learned trial judge had dealt with the matter of interpreting s. 304(1) of CA. We found her reading of the sub-s. (1) to s. 304 of CA at para. 42 in her grounds of judgment. It reads:

> 42. In determining whether there has been dishonesty I accept, with respect, Lord Hoffman's definition above and determine that this must be a question of fact to be ascertained from a consideration of the entirety of the relevant circumstances. The mere fact of directors carrying on business when they know that there is no prospect of the creditors being repaid therefore does not, of itself, warrant a finding of an intention to defraud purely on that basis alone. There must be something more. The fact of knowingly trading while insolvent such that the directors are aware that the creditors will not be paid, coupled with a conscious impropriety in the conduct of the business amounting to dishonest conduct, may well be sufficient to meet the threshold requirements of this section.

[82] To our mind, she had carefully discerned what was required by sub-s. (1) to be proved by the plaintiff. To her, merely doing business with knowledge that the company will not be able to pay later is not *per se* sufficient to trigger that subsection. There must, according to her, be proven as well the element of dishonesty on the part of the alleged perpetrator when such business was conducted. What would amount to dishonesty would depend on the circumstances of each case, but dishonesty there must be on the part of the alleged perpetrator. She relied on the decision of Lord Hoffman in the case of *Aktieselskabet Dansk Skibsfinansiering v. Brothers and Ors* [2001] 2 BCLC 324 where it was held that in looking for the element of dishonesty, it can be established by taking into consideration the entirety of the relevant circumstances. With respect, we are in agreement with the learned judge's interpretation of s. 304(1) of CA. The evidence in this case had shown clearly many circumstances on the part of the appellant where such element of dishonesty on his part can be readily attributed to him. We cannot agree with submissions by learned counsel that this had been a case of a failed but honest business venture of a businessman chasing after the pot of gold at the end of the rainbow. In fact, it was far from it. We therefore see no merit in the submissions on that issue by learned counsel for the appellant.

[83] It was also contended before us that there must be a scheme to defraud on the part of the appellant. Must there be scheme to defraud? To our mind, that would not be necessary to trigger the invocation of s. 304 of CA. To our mind, the wordings of s. 304 of CA do not lend itself to be read in such a manner as was submitted by learned counsel for the appellant in that there must first be established the existence of a scheme to defraud the creditors. A single act of doing business to defraud a creditor would be sufficient to trigger an action for compensation against the errant person in his personal capacity. Indeed the phrase employed by the section was 'any business of the company' and as cases had shown, even a singular act of doing business with such nefarious intent against the creditors would suffice to stick

liability on the errant person responsible for such an act. Again the case of *Siow Yoon Keong* case *(supra)* is a good illustration of such being the case. In the *Siow Yoon Keong* case *(supra)*, what had happened is that Siow who was the managing director of the company (Ventura) who had a joint-venture arrangement with the respondent company (H Rosen Engineering BV) had used Ventura's money to invest in shares on the stock exchange under his own name, instead of paying the said money to Rosen pursuant to the terms of the joint-venture agreement. He had acquired the shares by utilising funds which were meant for Rosen. But later, on realising that he was about to incur losses on the investment, he then arranged for the company Ventura to pass a resolution ratifying all his past investments making himself a trustee for Ventura. The effects of his corporate move had been 2-pronged: 1. His use of the money meant for Rosen for his shares was legitimised. 2. He recovered his personal losses as a result of the purchase of the shares in full from Ventura, as the shares were then held by him as a trustee for Ventura. Siow was found liable for the loss incurred by the respondent Rosen in the High Court. On appeal to the Court of Appeal, the decision was affirmed. In its judgment, the Court of Appeal had occasion to say: "Was the business of the company being carried out? We have no problem answering that question in the affirmative, without even referring to any authorities. Resolution was passed to ratify the investments, perhaps more correctly, 'speculations'. The company's funds were used to pay for the losses of the appellant. Rosen, to whom RM423,000 was due, was not paid. These acts in our view constitute 'carrying out business of the company." In coming to that conclusion, the Court of Appeal had made references to the following cases. In the case of *Re Augustus Barnett & Sons Ltd* [1986] BCLC 170, the court there held that the act of providing letters of comfort to a subsidiary was an act that had amounted to "carrying on the business" of the company. Yet again, in the cited case of *In re Sarflax Ltd* [1979] 2 WLR 202 the same phrase "carrying on the business" would not necessarily connote the active carrying on of trade. In a criminal case of *R v. Grantham* [1984] 2 All ER 166 the obtaining of credit for the company was held to be carrying on the business of the company. In the circumstances of the *Siow's* case *(supra)* it was held that the phrase "carrying on business" was established. We can find no reason to depart from the principles that are discernible from the *Siow's* case *(supra)*. As such, we find no merit in that argument by learned counsel for the appellant in that regard.

[84] We also are of the view that the decision in *Re William C Leitch Brothers Ltd* [1932] 2 Ch 71 as cited in *Siow*'s case *(supra)* still represents the law on what would or could amount to a 'fraudulent' purpose under s. 304(1) of CA. In that case, Maugham J (as he then was) had this to say:

> ... if a company continues to carry on a business and to incur debts at a time when there is to the knowledge of the directors no reasonable prospect of the creditors ever receiving payment of those debts, it is, in general, a proper inference that the company is carrying on business with intent to defraud.

[85] It was also the complaint by the appellant that the evidence as led by the respondents did not prove the claim under s. 304(1) of CA. In essence, learned counsel was saying that the learned trial judge was in error when she ruled that the respondents had proven their claim and found the appellant to be liable under s. 304(1) of CA on the evidence as led before her. We had considered the appeal records and the able submissions of both learned counsel on this matter and with respect, we are of the view that the learned trial judge was justified in concluding the way she did.

[86] Indeed, the learned trial judge was justified in coming to her decision that the appellant was liable for the claims against him under the provisions of s. 304(1) of CA. There was overwhelming evidence to that effect, such that however one were to look at it, it was very clear that CNLT's actions, through the appellant, who was then the managing director, had been designed to defraud the creditors. He was dishonest in his dealings the results of which had been that the creditors had been defrauded. The fact that only the employees had decided to initiate a suit against him and the other defendants does not make any difference a single bit, as he had, in his capacity as the managing-director of CNLT carried on business that had defrauded the creditors. He had dealt in transactions that had dubious objectives which not only had adverse ramifications on the CNLT itself, but they had also the effect of defrauding the creditors by holding out that CNLT was a going concern, so that the creditors would continue to do business with CNLT, when in fact, the latter was insolvent. Among others, it had involved fictitious and highly dubious transactions, for instance the payments to JCT without any valid supporting documents that could justify such payments, which were made over and above the legitimate interests of other creditors. In that payments to JCT there was not even any demand made for payment by CNLT. This was not surprising, as there was correspondingly no formal orders for the supply of yarn to CNLT by JCT. We are of the considered view, on the authorities referred to above in the preceding paragraphs of this judgment, that those payments made to JCT were business transactions that were carried out by the appellant to defraud the creditors, as they were clearly deprived of repayments of their loans to CNLT. As such, the learned trial judge was justified in making the consequential order against JCT to repay the monies so dubiously paid to it back to the provisional liquidators of CNLT. The dishonest intention on the part of the appellant in behaving the way he did was all too clear to see and too obvious to be ignored. The learned trial judge was entirely correct in coming to her conclusions as she did.

[87] We do note as well that there was no appeal by the respondents against the adverse finding by the learned trial judge on conspiracy to injure for lack of evidence before her, for her to make a positive and affirmative finding of conspiracy to injure against the relevant defendants. As such, we will say nothing more in respect of such finding.

[88] With regard to the claim premised on s. 304(1) of CA, we noted that the learned trial judge had approached the claims in a systematic manner that had helped given clarity to a potentially messy appreciation of the evidence which in themselves have been voluminous. It had given structure to better appreciate this case. We believe all parties would have no issue with that. Neither do we seek to depart from that approach taken by the learned judge.

[89] After perusing the records of appeal, we are, with respect, unable to agree with the contention of learned counsel for the appellant that the evidence as led by the plaintiffs had not made out their claims under s. 304(1) of CA. On the contrary, the findings of the learned trial judge had been backed by cogent evidence which had enabled her to arrive at strong findings of facts, in favour of the plaintiffs. But, as noted, she had been very fair and she did not rule entirely against the appellant, with a single stroke of the brush, although she had found as a matter of fact that the appellant was not a credible witness. Where there were documentary evidence that supported the appellant's contention, she had indeed given him that benefit, and to our mind, rightly so. But by and large the evidence were stacked heavily against the appellant such that they could be described as being overwhelming against him.

[90] As such, we are satisfied that the learned trial Judge had been correct when she had found that the plaintiff had succeeded in proving their case under s. 304 of CA. The element of 'intent to defraud creditors' has been established when she positively answers the following issues (except issue no iii) raised by the plaintiff, namely:

Issue (i) CNLT, Primarily Through Its Managing Director, Sahgal, Prepared Or Issued Fictitious Invoices In 2007 To An Entity Known As MTI (Far East) Sdn Bhd With A View To Inflating Or Overstating Its Revenue, Such That CNLT Would Appear To Be A 'Going Concern', Or At The Very Least, Not As Insolvent As It Actually Was

[91] This was reflected in her findings in paras. 90 - 93 of her grounds of judgment, as follows:

> 90. Having heard the evidence at some considerable length, and having considered the documentary evidence as a whole it appears to this Court that the 37 invoices were indeed fictitious. In this context I found the forensic accountant, PW-6 to be a reliable witness. He withstood the lengthy cross-examination well, and did not retract his finding that there was a clear intention to mislead or 'defraud' in relation to these 37 invoices. He maintained that they were fictitious for the reasons I have set out above. He was an independent witness in that he had no personal interest in the outcome of this matter. The thrust of the cross-examination centred on the viability of the FHMH report which concluded that the invoices were likely to be genuine. However, given that no one from FHMH testified or was cross- examined on the same, I am unable to give the same weight to that report as I can to the forensic accountant's several detailed and comprehensive reports. More

A significantly it is evident that there was some deliberate editing of the FHMH report in relation to a material finding in relation to the inflation of income for the 2nd and 3rd quarters of 2007, which was subsequently deleted in the final report. This again was not explained. It is clear to my mind that the forensic accountant's report is to be accorded considerably more weight than that of FHMH. The only 'shortcoming' as it were, B would be the inability on the part of the forensic accountant to interview and consider Sahgal's version of events. However his version of events was ventilated in full in court. Having heard him, I am satisfied that he is not a credible witness. For the purposes of this allegation relating to the 37 invoices, I conclude that they are fictitious by reason of a consideration of the evidence I have set out above. I found Sahgal's C version of events to be simply incredible and difficult to believe. The lack of any form of documentary trail to evidence the authenticity of these transactions coupled with the fact that a handwritten internal memorandum suddenly surfaced after this irregularity was highlighted, cemented my view that he was not being truthful in the witness box. D Apart from the foregoing evidence which supports my conclusion, the following matters are also contradictory and support my conclusion that the invoices are fictitious and were raised purely to inflate or exaggerate CNLT's income for the 2nd and 3rd quarters of 2007 so as to give CNLT an appearance of being a 'going concern'.

E (i) The date of the proforma invoice for the purported sale of goods to Minerva was 20 September 2007, while the internal memorandum on the cancellation of the alleged sale to MTI was dated 3 October 2007. Is it possible that the intention to sell the goods to Minerva was mooted before the rejection of goods by MTI?

F (ii) No evidence of the existence of these goods packed and ready for shipment to either MTI or Minerva. The provisional liquidators found no sign of this quantity of goods which would require considerable storage space;

(ii) The invoices are dated between May and July 2007. Production of yarn had dropped drastically due to a shortage of raw material prior G to this in April 2007.

(iii) PW-2 testified in the course of her evidence as a delivery clerk in CNLT that around this period she was requested by Sahgal's secretary to raise various invoices without the physical goods. She was not cross-examined on this point;

H (v) Why would a company in liquidation that had ceased operations take delivery of such a quantity of goods, that too with no documentation whatsoever?

(vi) How could such a company in liquidation procure financing from Minerva, a finance house established in the British Virgin Islands?

I 91. I therefore concur with learned counsel for the Plaintiff that the totality of the evidence bears out the conclusion that in reality the sums of money remitted by Minerva to CNLT was for a wholly different purpose. The forensic accountant found that there was in fact a loan

agreement between one Roneel Securities (GB) Limited and CNLT whereby Roneel agreed to provide CNLT a loan amounting to USD1.85 million. Roneel is a substantial shareholder of CNLT. This agreement was signed by Sahgal.

92. Minerva Financial acted as an agent for Roneel which advised Sahgal of the remittance of USD1,150,000 and USD700,000-00 on the 15th and 18th of June 2007. It was in the nature of a loan rather than payment for the supply of any yarn.

93. Given the foregoing, the entire version of events about Minerva taking up stock purportedly produced for MTI is also less than credible. I therefore find as a fact that the 37 invoices, on the entirety of evidence before this Court, were fictitious. They were created specifically to establish that CNLT was a 'going concern' in 2007. However by reason of the provisional liquidators and the forensic accountant querying the authenticity of these invoices, steps were taken by Sahgal to screen or hide this deliberate falsehood. This led to an invention of a further series of events to explain how this alleged quantity of yarn was purportedly dealt with. These events appear to this court to be a fabrication and a sham, concocted purely to try and explain the fictitious invoices. The first allegation relating to the fictitious invoices is therefore established.

Issue (ii) The Value Of The Plant And Machinery Of CNLT Was Deliberately Exaggerated, Overstated Or Exaggerated To Present CNLT As A Going Concern Has Been Made Out

[92] This is based on the evidence by Rajendran a/l Muthusamy (PW1) who was CNLT ex Maintenance Manager, that he was instructed by Sahgal to give misleading information to the valuer about the value of machinery. (See paras. 94- 98 of her grounds of judgment).

[93] The valuation report of Colliers dated 30 June 2010 indicated that the book value accorded to the plant and machinery was RM 13.9 million greater than its actual value (see para. 99 of her grounds of judgment);

[94] The accounts for 2006 were not entirely accurate as they contained an inflated or exaggerated figure for the value of machinery. There was also an element of duplicity initiated at the behest of Sahgal when the double spinning frame was allowed to be valued, mistakenly, twice, again resulting in a fictitious inclusion of some RM11 (see paras. 101- 109 of her grounds of judgment);

[95] The court had rejected the opposing view given by Ferrier Hodgson in its alternative report because the maker was not available for cross examination, unlike the forensic accountant who was available and defended his finding satisfactorily (see para. 111 of the grounds of judgment).

[96] Therefore the learned judge had concluded that the second allegation that the value of plant and machinery was deliberately overstated or exaggerated to present CNLT as a going concern was made out.

Issue (iii) A Portion Of CNLT's Funds/Monies Were 'Siphoned' By Way Of Payments To One Golden Privilege Sdn Bhd ("GP") Purportedly For Rental When No Tenancy Agreement Subsisted And Golden Privilege Is Controlled By Sahgal And D7 ie, The Human Resources Manager

[97] The court found that it was not made out. This is because the learned High Court Judge satisfied with Sahgal's response on this issue that CNLT had made disclosures of related party transactions concerning Sahgal's interest in GP as stated in paras. 117 - 122 in her grounds of judgment, quoted as follows:

> 117. Sahgal meets this contention by responding that GP was incorporated on 22 June 1993. It was a dormant company. It was struck off the Register of Companies on 6 February 2007. CNLT had made disclosures of related party transactions concerning Sahgal's interest in GP.
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> 118. He further stated that the Board had approved the payment of rental for his residence in the sum of RM12, 000-00 as part of his remuneration package. This was in August 1999. He concurred that there was no tenancy agreement between GP and CNLT. However such payments were a 'perk' or benefit in kind which he enjoyed as Managing Director. And such payments were utilised for his residence as he was an expatriate. In short it was a housing allowance which comprised a part of his contract of employment.
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> 119. This benefit which comprised a part of his employment contract continued when he was promoted to the position of general manager. He then approached the board of directors of CNLT and requested that he be entitled to the value of the housing accommodation. The Board agreed to this. As such it was not necessary for him to utilise the said emolument solely for rental of premises. The rental was classified as a 'benefit in kind' at all times in CNLT's annual reports and properly disclosed under the title 'Directors' Remuneration'. Sahgal had also disclosed this rental payment as part of his income to the Inland Revenue Department and paid income tax on the said income.
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> 120. He further explained that the rental had been paid to GP at his request and the Board had agreed. Sahgal then declared this housing perk as part of his income and paid tax on the same, as borne out by his income tax returns.
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> 121. After Sahgal purchased his house from Advance Point, the property developer of Kasturi Klana Park in 1994, these rental payments were utilised towards paying off the purchase price of the subject property. He conceded that CNLT had given him a loan to partly finance the purchase of this house from Advance Point prior to it being listed. The debt as such is between Sahgal and Advance Point and does not involve CNLT.
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> 122. He therefore maintained that in view of this full disclosure there was no question of monies being siphoned off from CNLT. All 'rental' payments were properly documented and properly accounted for. In any

event these emoluments comprised a part of his income due under his contract of employment and his utilisation of these monies for the purposes of paying off the balance purchase price of a property he had purchased did not amount to a drawing off of monies belonging to CNLT.

Issue (iv) CNLT's Assets In The Sum Of USD1,250,000 (Approximately RM4,750,000) Were Dissipated Or Channelled To CNLT's Largest Shareholder, JCT Limited, The Eighth Defendant In This Suit After CNLT Had Been Listed As A PN17 Company And Its Auditors Had Expressed Concerns About Its Viability As A 'Going Concern'?.

[98] The learned High Court Judge found that the payment of USD 1.25 million to JCT Limited was a preferred repayment of an advance to an unsecured creditor and shareholder in preference over the rest of the body of unsecured creditors. It contravened s. 293 of the Companies Act 1965 read together with s. 53 of BA. (Refer to para. 135 of her grounds of judgment). She based such findings as she found that Sahgal's evidence to be entirely implausible for the following reasons:

(i) There is no documentary evidence substantiating this alleged order for ordinary as well as 'specialised' yarn from JCT Limited. There is only Sahgal's oral evidence;

(ii) There is no documentary evidence in relation to the alleged late supply of such yarn. In fact there is no evidence that JCT Limited required this yarn as of February 2007;

(iii) There is no written demand from JCT Limited for compensation for such alleged late delivery. On the contrary there is simply nothing in writing on this subject between the two entities, CNLT and JCT;

(iv) There was no discussion at the board level in CNLT in relation to the issues of either a refund of the sum of USD890,000 or compensation of USD360,000. It would be expected that a decision to refund such large sums of money and to voluntarily pay out compensation of USD360,000 particularly in a company which had just declared itself to be in a financially precarious situation would require serious deliberation, not to mention disclosure to several authorities;

(v) These payments were not disclosed to the audit committee. In this context therefore Izham and Ishah had no knowledge of such disbursements;

(vi) The decision to allegedly 'refund' and 'compensate' JCT Limited could only come from Sahgal and the resident Indian Directors or one or more of them.

(vii) These payments were not recorded in the audited accounts of either CNLT or JCT Limited;

(viii) No announcement was made to Bursa in relation to these substantial payments out to CNLT's largest shareholder;

(ix) These payments out to JCT Limited were made after it was announced that CNLT had been classified as a PN17 company and after the announcement that it had suffered substantial losses for the first quarter of 2007;

(x) Man Mohan Thapar, D2, had written a letter on 29 March 2007 to CIMB, a secured lender of CNLT seeking support and confirming that RM3.2 million had been brought in by shareholders in December 2006. This is exactly the amount which was remitted by JCT Limited to CNLT in the form of USD890,000. However Sahgal chose to explain these monies as having been remitted for the purchase of goods by JCT Limited from CNLT. In other words D2's letter too evidences the fact that the sum of USD890,000 was a shareholder advance by JCT Limited to meet the flailing needs of CNLT;

(xi) This sum of money was reported as a shareholder advance from JCT Limited in CNLT's 2006 annual report;

(xii) Despite the recording of these monies as an advance from JCT Limited there is no record of these monies having been remitted back to JCT in June 2007. Neither is there any corresponding reduction shown in JCT Limited's shareholder advances;

(xiii) There is no explanation forthcoming from JCT Limited in respect of this entire transaction as no witnesses testified on its behalf. Instead it relied on the evidence of Sahgal.

[99] Even with the knowledge that knowing that CNLT was not a going concern, Sahgal and those directors in control of JCT Limited decided to exit CNLT by June 2007 with a recouping of as much of CNLT's assets as was reasonably possible, including their advances. This seriously depleted the assets available to the body of unsecured creditors, including the employees.

[100] At the same time that such siphoning was being undertaken however, and despite knowing that CNLT was no longer a going concern, representations continued to be made to creditors, particularly the employees from 2007 to April 2008 that CNLT was in fact a going concern that was to be restructured. This comprises a key element of the fraudulent trading that is envisaged in s. 304 of the Companies Act 1965. The 'deception' as it were continued throughout 2007 and onwards past May 2008 until the provisional liquidators were appointed. No efforts were made by the directors thereafter to deal with the employees' benefits until they were effectively discharged by the order of winding up of CNLT on 16 September 2009 (See para. 139 of the grounds of judgment).

Issue (v) CNLT, Through Inter Alia, Sahgal Caused 3 Cash Cheques In The Sum Of RM160,000 To Be Issued On 11 September 2007 After The Appointment Of Provisional Liquidators On 6 September 2007. These Three Cheques Were Encashed On 12 September 2007, Resulting In A Further Channelling Of Funds In The Sum Of RM160,000 to D7

[101] The learned trial judge found that this contention of the plaintiffs has been borne out by the evidence, which amounts to a wrongful dissipation of the remaining assets of CNLT. This is so, more particularly because provisional liquidators had by then been appointed to preserve the assets of CNLT for the entire body of unsecured creditors. All Sahgal's explanation is not tenable as there is no evidence produced to support his justification. (See paras. 142- 145 of the grounds of judgment)

Issue (vi) CNLT Failed To Remit Employees Provident Fund And Social Security Organisation Contributions, Both Employer And Employee, Despite Deducting The Requisite Employee Contribution. Neither Was Income Tax Paid, Despite The Requisite Deductions Having Been Made. As A Consequence Civil Suits Were Filed By The Employees Against The First To Sixth Defendants

[102] This fact is not disputed. The failure to remit these statutory payments amounted to a deliberate omission, with the dishonest intention of channelling these funds out of CNLT in favour of preferred unsecured creditors and shareholders. So this allegation is substantiated. (Refer to paras. 148-152 of her grounds of judgment)

Issue (vii) Sahgal Dissipated Assets Out Of The Reach Of The Provisional Liquidators In May 2008

[103] Even after the appointment of the provisional liquidators, Sahgal had removed the stocks of material which he had disclosed in the statement of affairs as belonging to CNLT to other warehouse on 3 May 2008. His email dated 18 July 2008 which stated among other 'Do not worry, materials are safe, once we return PL on 23rd, we can move as we like, I moved the goods so that it is not easily in reach of the provisional liquidators so far it is working well. I hope you understand this' suggested that Sahgal had deliberately sought to conceal the company's assets in the premise of V- Top.

[104] In this context, the provisional liquidator's report stated that Sahgal had only verbally advised them that the said stock had been transferred to a warehouse. The Statement of Affairs did not disclose that the stock was being stored or kept at V-Top as suggested by Sahgal in his email. When the provisional liquidators had asked on appointment where these stocks were warehoused, they had received no answer from Sahgal. (See para. 160 of her grounds of judgment.)

[105] Sahgal also tried to explain what he meant in his email was that once the provisional liquidators had been removed, the subject goods or monies could be given to Global Tradewell, but that he had no intention of parting with those goods to Global Tradewell at that juncture in view of the appointment of the provisional liquidators. Sahgal also maintained that there were other relevant emails which were not available, his email having been hacked.

[106] He maintained that he had reiterated to V-Top that the goods stored there were CNLT's goods which were stored there for safety. In short he denied any deliberate attempt to siphon off or conceal these goods. (See para. 163 of her grounds of judgment).

[107] However the learned trial judge had found that there was nothing in writing to substantiate Sahgal's version of events. The fact that Sahgal was found to be in contempt of court because Sahgal refused to hand over the necessary documents or hand over control to Provisional Liquidator satisfied the plaintiffs' allegation that Sahgal had dissipated assets out of the reach of the provisional liquidators.

Issue (viii) Were Unauthorised Payment Made Out Of CNLT's Assets During The Period When The Retraining Order Was In Place Without Validation?

[108] CNLT obtained a restraining order on 26 October 2007 under s. 176 of CA. The restraining order continued in force until 7 April 2008, ie, for a period of slightly more than five months. During this time payments were made out to preferred unsecured creditors, as well as some shareholders in the sum of not less than RM2,841,696, without any validation order being procured. Such payments were made between 26 October 2007 and 7 April 2008. This includes payment of RM50,104 from CNLT's monies to Sahgal. Sahgal maintains that these monies comprised the repayment of a loan he had earlier afforded to CNLT however there is nothing in writing to substantiate that such a loan was ever given to CNLT by Sahgal personally. Such payments were also not in the ordinary course of business of CNLT (See paras. 170-172 of her grounds of judgment)

[109] Therefore, the learned High Court Judge found that this allegation has also been made out. Sahgal had deliberately sought to dissipate assets even after the appointment of provisional liquidator.

[110] As such, it is our considered view that the findings of facts made by the learned trial judge had been impeccable. As regards her findings against JCT, suffice it is for us to say here that they are considered in the separate judgment for that appeal by JCT. Her findings on the law pertaining to s. 304(1) of CA were also correct. We noted that in the *Siow Yoon Keong*'s case *(supra)* there was only one transaction that had the effect of amounting to carrying on business with an intention to defraud a creditor and that it had

qualified as a case fit and proper for a declaration as envisaged under s. 304(1) of CA. In comparison, here in this appeal, we have overwhelming evidence that had shown clearly that CNLT through Sahgal, had carried on business that clearly had intention to defraud the creditors, including the plaintiffs. They were done to give the impression that the CNLT was a going concern when it was not. Objectively, the effect of such action by Sahgal would be to deceive creditors in the sense that they would not foreclose on the loans given to CNLT. Again the fraudulent siphoning of monies to JCT would also deprive creditors of ready funds that could be used to service their loans. The non-remissions of the EPF contributions of both companies and the employees-plaintiffs and the false promises of payments of salaries to the plaintiffs are again instances of such fraudulent intent on the part of Sahgal who then was the managing director of CNLT. In the context of the evidence adduced in this case, Sahgal was properly the person envisaged under s. 304(1) of CA against whom the declarations had correctly made in her judgment. In that regard the alternative submission by learned counsel for Sahgal that Sahgal was not liable under s. 304(1) of CA must also fail.

[111] Perhaps, we would be more than justified to repeat the words of the Court of Appeal in the *Siow Yoon Keong*'s case *(supra)* and apply them *mutatis mutandis* to this appeal:

> By any standard, civil or criminal, clearly there was an intention to defraud Rosen or that it was done with a fraudulent purpose. Note that the section only uses the term 'if it appears' which indicates that a lower degree of proof is required. But, even on a degree of proof, the result would be the same.

[112] The evidence led before the court in this case had just been overwhelming in bearing out the impugned conduct of CNLT, actuated to a great extent by its managing director, named Sahgal, the appellant in this immediate appeal before us. The learned trial judge was correct when she declared that the business of CNLT (Far East) Berhad was carried on by Sahgal with intent to defraud the creditors pursuant to s. 304 of the Companies Act 1965.

This Court's Decision

[113] In the upshot therefore, we will dismiss this appeal as it is totally lacking in merits. There is more than ample evidence flying in the face of the learned trial judge for her to come to the decision that she did, and we find no cogent reasons whatsoever to disturb her findings pertaining to this appeal. As regards the standard of proof issue, if indeed she had erred, it is our respectful view that she had erred in favour of the appellant and no miscarriage of justice was visited upon the appellant. In the final analysis, we

A are of the considered view that the learned trial judge was not plainly wrong in deciding the way she did. As such, this is no occasion for us to exercise our appellate powers. (See the case of *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309.) We therefore affirm her decision with costs.

B **[114]** As to costs, after hearing parties, we had awarded a sum of RM50,000 to the first to 83rd respondents. We also had ordered costs to be paid by the appellant to the 84th respondent.

[115] We ordered too, that the deposit to be returned to the appellant.

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